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SUBJECT: WHO: SECOND SESSION OF THE INTERGOVERNMENTAL
NEGOTIATING BODY (INB2) ON A PROTOCOL ON ILLICIT TRADE IN
TOBACCO PRODUCTS UNDER THE FRAMEWORK CONVENTION ON TOBACCO
CONTROL (FCTC)

¶1. Summary. INB2 met October 20-25, 2008, in Geneva to develop a protocol under the FCTC to combat illicit trade in tobacco products. It was attended by representatives of 133 Parties to the FCTC, as well as 16 State non-Parties (including the United States), two intergovernmental organizations, and nine nongovernmental organizations accredited as observers to the Conference of the Parties (COP). Under the guidance of the Chair, Ian Walton-George of the European Anti-Fraud Office, the INB accepted the "Chairperson's text for a protocol on illicit trade in tobacco products" as the basis for negotiations. The INB also endorsed holding a third INB from 28 June to 5 July 2009 in Geneva and authorized a fourth INB in 2010, if necessary. The INB requested the Secretariat to arrange for expert reviews on a number of elements of the draft protocol, such as the feasibility of an international system for tracking and tracing, the relationship of the protocol to other relevant international agreements, the treatment of sales via the internet, and the relationship between illicit trade and duty free sales. The INB also asked that WHO regional groups be able to consult prior to INB3. End summary.

BACKGROUND

¶2. The FCTC is the first global public health treaty negotiated under the auspices of the World Health Organization (WHO) and is viewed by many countries as an important basis for advancing tobacco control measures internationally. The FCTC targets both the demand and the supply of tobacco products by requiring Parties to adopt measures on smoking prevention and cessation, the placement of health warnings on packaging, restrictions on tobacco advertising and sponsorship, prohibition on cigarette sales to minors, establishment of clean indoor air controls, and implementation of effective measures to combat illicit tobacco trade, among others.

¶3. The FCTC entered into force on February 27, 2005, and has been ratified by 160 WHO member States. The United States has signed but not ratified the FCTC and participates in the COP and related meetings as an Observer.

PROCESS

¶4. INB2 examined the Chairperson's text through the plenary, two committees (A and B) that met concurrently, and a working group that examined the scope and definitions of the protocol. General obligations and institutional and

financial matters were discussed only in principle, recognizing the need for more detailed discussions in the future. The Parties also discussed the scope and the title of the protocol and references to the primacy of public health and to the linkage between illicit trade and the tobacco industry. The U.S. did not participate in Committee B or working group discussions. The reports produced by the committees and the working group were discussed in plenary to allow smaller delegations full participation before the INB plenary approved the reports.

15. Committee A discussed issues contained in Part III of the Chairperson's Text, which addresses "supply chain control" such as licensing, customer identification and verification, tracking and tracing, record-keeping, security and preventive measures, and internet and duty free sales. This committee also discussed selected provisions of Part IV of the Chairperson's Text, including search and seizure, special investigative techniques and destruction of confiscated property.

16. Committee B discussed the remaining Part IV issues, such as offenses, liability, and sanctions, and the Part V (International Cooperation) issues of information sharing, confidentiality protection, training, law enforcement cooperation, jurisdiction, mutual legal and administrative assistance, and extradition.

KEY ISSUES DISCUSSED

17. Track and Trace: The "make or break" issue for the protocol is the establishment of a mandatory international

track and trace system. There was significant discussion on the scope of such a system. A majority of delegations, led by the European Community (EC), wanted such a system to cover not only tobacco products but also raw tobacco and the equipment (including parts) used to make the tobacco products. (Note: the EC was silent on tracking and tracing raw tobacco but wants to include "acetate tow," an ingredient used to make cigarette filters that is made by only seven manufacturers in the world.) A significant minority, led by Brazil, wanted to limit the system to tobacco products. Japan and many developing countries expressed concern that a track and trace system would have to be based on very costly and sophisticated technology. Developing countries added that they would need financial and technical assistance as well as "capacity building" to comply with a future protocol.

There was also significant discussion on whether the track and trace system should be mandatory, based on minimum international standards (EC), or only in a manner consistent with domestic law (Canada and Japan). Moreover, for a track and trace system to work, most countries favored imposing "due diligence" and "know your customer" requirements on all of the entities involved in the "tobacco growing, manufacturing, and distribution chain." Tracking and tracing was one of the areas where the Chairperson and the INB agreed that further study by experts and working groups was required prior to the next INB.

18. Licensing: There was consensus that licensing, or a regulatory program that provides similar results, was essential to a protocol. However, there was considerable debate as to which entities should be licensed. There was significant support for licensing on the broadest scale - tobacco growers, leaf processors and dealers, manufacturers of tobacco products and the machinery that makes them, transporters, wholesalers, importers, and retailers. A large number of Parties preferred excluding growers and retailers from a mandatory system. Several delegations also favored charging licensing fees with the resultant funds being dedicated to public health measures. Other delegations voiced opposition to requiring fees and to earmarking the collected funds.

19. Internet and Duty Free Sales and Sales in Free or Foreign Trade Zones: The vast number of Parties favored banning

internet and duty free sales of tobacco products. For the first time in the negotiations, a significant number of Parties voiced support for prohibiting the sale of tobacco and tobacco products in free or foreign trade zones, while others advocated prohibiting "any tax, regulatory or other advantages that apply to free or foreign trade zones to tobacco and tobacco products." Japan (internet and duty free) and Barbados (duty free) explained that other measures to control the sale of these products were available that were not as drastic as complete and total bans. The EC asked the Secretariat to provide a legal opinion as to whether internet and duty free sales could actually be banned under the rules of the World Trade Organization.

¶10. Relationship of the Protocol with Other International Agreements: Part IV and the remainder of the Chairperson's Text contain provisions "borrowed" from pre-existing agreements, such as the United Nations Convention Against Transnational Organized Crime (UNCTOC or Palermo Convention) and the UN Convention Against Corruption. For example, the "confiscation and seizure of assets" provision of the Chairperson's Text is almost a verbatim copy of Article 12 of UNCTOC. Australia and the United States voiced concern that incorporating provisions from other agreements may raise issues of treaty interpretation (not only with regard to the protocol but the text of the "host" agreement), particularly if such incorporation were not done "by reference" and without first consulting with the governing bodies of the incorporated agreements. The INB requested the COP Secretariat to consult with the appropriate governing bodies before INB3.

CONCLUSION

¶12. Chairperson Walton-George will present a report on INB2 at the COP3 meeting to be held in Durban, South Africa, on

November 17-22, 2008.

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